

Honorable Christopher M. Alston
Chapter 11
Hearing Location: Seattle
Hearing Date: December 14, 2018
Hearing Time: 9:30 a.m.
Chapter 11

Thomas S. Linde
Schweet Linde & Coulson, PLLC
575 S. Michigan St.
Seattle WA 98108

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:

JACOB BUTTNICK,

Debtor.

No. 13- 20151-CMA

OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APPROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY

I. RELIEF REQUESTED

Creditors Jolan, Inc. and Lance Miyatovich (the "Jolan Creditors") file this Objection to Motion to Reopen Case, Application for Approval of Trustee Fees, Application for Compensation of Accountant, and Application for Compensation of Attorney ("Objection"). The Jolan Creditors respectfully request that the Court deny the Trustee's Motion to Reopen Case, Application for Approval of Trustee Fees, Application for Compensation of Accountant, and

OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 1

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1 Application for Compensation of Attorney (the "Motion") because: (1) this Court lacks
2 jurisdiction to grant the Motion because this proceeding was dismissed over four years ago; and
3 (2) notwithstanding this lack of jurisdiction, even if the Court has jurisdiction, through equitable
4 subrogation, the Jolan Creditors would be entitled to the rents collected by the Trustee Ronald G.
5 Brown (the "Trustee") which were subject to assignments of rents in the deeds of trust held by Jacob
6 Buttnick's secured creditors at the time of the dismissal of this Chapter 11.
7

8 II. FACTS

9
10 This bankruptcy was filed on November 20, 2013, by the Debtor Jacob Buttnick
11 ("Debtor"). *See* Dkt # 1. At the time of filing, Debtor's assets were being administered in a state
12 Court receivership in King County Cause No. 13-2-23670-2 SEA (the "Receivership") which
13 included Debtor's real property at 201, 203, 205 First Ave. S., Seattle, WA (the "Property")
14 which was the Debtor's primary asset. At the time of filing, Whidbey Island Bank held a first
15 position deed of Trust against the Property which included an assignment of rents. *See, i.e.,*
16 *Response of Whidbey Island Bank to Motion to Appoint Chapter 11 Trustee*, Dkt. # 39. Fairview
17 Investment Funds, I LLC ("Fairview") also had three deeds of trust recorded against the Property
18 which also held assignments of rents. *See* Claim 4-1; *see also Fairview Investment Funds I, LLC 's*
19 *Response to Receiver's Motion to Approve Accounting, Award Compensation, Etc.*, Dkt #31.
20 Finally, pursuant to their state court judgment, behind Whidbey Island Bank and Fairview's liens, the
21 Jolan Creditors also had a lien on the Property, subordinate to that of Whidbey Island Bank and
22 Fairview, pursuant to a Stipulated Judgment entered in the King County Superior Court on August 9,
23
24

25
26 OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 2

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1 2012. *See Declaration of Lance Miyatovich in Support of Motion for Relief from the Automatic*
2 *Stay by Creditors Jo/an, Inc., and Lance Miyatovich*, Dkt. # 95 at 28.

3 During the pendency of the bankruptcy, the Trustee collected rents on the Property, and
4 as early as March 31, 2014, had collected approximately \$25,000 from collected rents which, as
5 the Trustee acknowledged, both Whidbey Island Bank and Fairview Investments claimed as their
6 cash collateral pursuant to assignment of rent provisions. *See Trustee 's Motion to Approve Use*
7 *of Cash Collateral to Pay Insurance/Bond Fee and Motion to Continue Trustee's Motions to*
8 *Approve Sale or Abandon Real Estate*, Dkt. # 56 at 2.

9 On April 4, 2014, an Order Granting Relief from Stay and Dismissing Case (the
10 "Dismissal Order") was entered dismissing this proceeding. *See Notice of Dismissal*, Dkt. # 172.
11 Subsequently, on April 25, 2014, this case was closed by order of the court clerk.

12 Thereafter, in June of 2014, the Debtor Jacob Buttnick placed himself into another
13 receivership whereby the Property was eventually sold pursuant to an Agreed Order Approving
14 Sale Free and Clear in King County Cause No. 14-2-15399-6. *See Declaration of Thomas Linde*
15 *in Support of Objection to Motion to Reopen Case, Application for Approval of Trustee Fees,*
16 *Application for Compensation of Accountant, and Application for Compensation of Attorney,*
17 Exh. A. Pursuant to the Agreed Order Approving Sale Free and Clear, the Property was
18 eventually sold with Whidbey Island Bank and Fairview both being paid in full from the
19 proceeds of the sale. However, as noted above, the Jolan Creditor's second judgment (entered on
20 April 17, 2014 after this bankruptcy was dismissed) was not paid in full.

21
22
23
24
25
26
OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 3

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1 As the Trustee acknowledges in his present motion, Whidbey Island Bank and Fairview
2 were paid in full from the sale of the Property in the second receivership proceeding. At that same
3 time, the Jolan Creditors were partially paid in the second receivership but not in full.
4 Consequently, had the cash collateral rents collected by the Trustee been turned over and paid to
5 Whidbey Island Bank and/or Fairview, the Jolan Creditors would have received the benefit of
6 these rents being applied to the indebtedness of Whidbey Island Bank and/or Fairview. Because
7 these funds were not applied to these obligations, the amounts disbursed to the Jolan Creditors in
8 the second receivership proceeding were decreased by the same amount.

9
10 Now, nearly five years after the case was dismissed, the Trustee has filed the present
11 Motion to reopen this dismissed case to administer funds in order to pay his fees (as well as his
12 attorney and accountant).

13 14 **III. ISSUES**

15 Whether the Court should deny the Motion when: (1) court lacks jurisdiction to grant the
16 Motion because this case was dismissed over 4 years ago; and (2) even if the Court has
17 jurisdiction, through equitable subrogation, the Jolan Creditors would be entitled to the rents
18 collected by the Trustee which were subject to assignments of rents in the deeds of trust held by
19 Debtor's secured creditors and should have been turned over to them.

20 21 **IV. EVIDENCE RELIED UPON**

- 22 1. Declaration of Thomas S. Linde in Support of Objection to Reopen Case, Application for
23 Approval of Trustee Fees, Application for Compensation of Accountant, and Application
24 for Compensation of Attorney; and
25 2. The record and files contained therein.

26 **OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 4**

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

V. ARGUMENT

A. **Because this Bankruptcy was Dismissed over Four Year Ago, this Court Lacks Jurisdiction to Grant the Motion.**

The Ninth Circuit Court of Appeals has held that where a bankruptcy is dismissed, there is no longer any bankruptcy case in existence and the bankruptcy court no longer has jurisdiction. *See In re Income Property Builders, Inc.*, 699 F.2d 963 (9th Cir. 1982). As stated by the Ninth Circuit Court of Appeals:

11 U.S.C. § 349, treating the effects of a bankruptcy, obviously contemplates that on dismissal a bankrupt is reinvested with the estate, subject to all encumbrances which existed prior to the bankruptcy. After an order of dismissal, the debtor's debts and property are subject to the general laws, unaffected by bankruptcy concepts. After dismissal a debtor may file another petition for bankruptcy unless the initial petitions was dismissed with prejudice.

Id. at 965.

In this instance case, the bankruptcy was dismissed, and the Trustee, knowing it was holding funds, did not challenge the dismissal or move to vacate the dismissal at any point. *See* Fed. R. Bank. P. 9024; Fed. R. Civ. P. 60 ("A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). Accordingly, as the case was dismissed and not vacated within one year, the Court is without jurisdiction to grant the relief requested in the Motion. Accordingly, the Motion should be denied.

OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 5

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1 **B. Even if the Court has Jurisdiction, the Jolan Creditors have a Superior**
2 **Claim to the Funds Under the Doctrine of Equitable Subrogation.**

3 As discussed, the funds collected by the Trustee were subject to assignments of rents in
4 favor of Whidbey Island Bank and Fairview. Because the Trustee did not turnover such funds to
5 Whidbey Island Bank and Fairview, the Jolan Creditors were denied the benefit of these funds
6 being applied to those obligations meaning that the amounts disbursed to the Jolan Creditors
7 were decreased by the amount of the funds now being held by the Trustee. As the Washington
8 State Supreme Court stated in *Columbia Community Bank v. Newman Park, LLC*, 177 Wn.2d
9 566, 304 P.3d 472 (2013):
10

11 Equitable subrogation allows one party to step into the shoes of
12 a second party who is owed a debt or obligation and to receive the
13 benefit of that debt or obligation, in the absence of any contractual
14 agreement or assignment of rights between those two parties or the
15 debtor. *See *57 Winters v. State Farm Mut. Auto. Ins. Co.*, 144
16 Wash.2d 869, 875, 31 P.3d 1164 (2001). Subrogation is permitted
17 without assignment in order to prevent unjust enrichment. *See*
18 *Prestance*, 160 Wash.2d at 576, 160 P.3d 17. Unjust enrichment is
19 an equitable doctrine; thus this sort of subrogation is called
20 equitable subrogation.

21 In its simplest form, equitable subrogation involves three
22 parties: a lender, a debtor, and a third party. If a third party pays a
23 debtor's outstanding loan to the lender without any formal
24 agreement between the parties, then, under certain circumstances,
25 equity permits the third party to take over the lender's interest and
26 receive the continuing payments of the debtor-to step into the
27 lender's shoes to the extent of the current obligation. In other
28 words, the third party is subrogated to the lender's interest.

29 177 Wn.2d at 573-574 (emphasis added).

30 OBJECTION TO MOTION TO REOPEN
31 CASE, APPLICATION FOR APROVAL OF
32 TRUSTEE FEES, APPLICATION FOR
33 COMPENSATION OF ACCOUNTANT,
34 AND APPLICATION FOR
35 COMPENSATION OF ATTORNEY - 6

36 SCHWEET LINDE & COULSON, PLLC
37 575 S. MICHIGAN ST.
38 SEATTLE WA 98108
39 P: 206-275-1010 || F: 206-381-0101

1 In the Motion, the Trustee takes for granted that he and his professionals are entitled to the
2 funds, but it is indisputable that if such funds had been properly turned over to the state court
3 receivership or to Whidbey Island Bank and/or Fairview, said funds would have gone to reduce
4 the amounts owing under the Whidbey Island Bank and/or Fairview's loans. Had this actually
5 occurred, the Jolan Creditors would have received the benefit of those funds being applied and in
6 essence paid these amounts to the prior creditors in the form of a reduced disbursement. Thus,
7 under the theory of equitable subrogation, the Jolan Creditors (as the party shorted) should be
8 permitted to step into Whidbey Island Bank and Fairview's shoes under their assignments of
9 rents and receive the benefit of the funds the Trustee has failed to turnover. Consequently, even
10 if this Court has jurisdiction with regard to the Trustee's Motion, such funds should be paid to the
11 Jolan Creditors under the theory of equitable subrogation.
12

13 VI. CONCLUSION

14 Because: (1) this court lacks jurisdiction to grant the Motion which was filed four years
15 after this bankruptcy was dismissed; and (2) even if the Court does not lack jurisdiction, the
16 Jolan Creditors are equitably subrogated to the rights of Whidbey Island Bank and Fairview and
17 are entitled to a turnover of the funds being held by the Trustee, the Motion should be denied.
18

19 Respectfully submitted this 7th day of December, 2018
20

21 SCHWEET LINDE & COULSON, PLLC
22 Attorneys for the Jolan Creditors

23 By: /s/ Thomas Linde
24 Thomas S. Linde, WSBA #14426
25 Jacob D. Rosenblum, WSBA #42629

26 OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APPROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 7

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

On December 7, 2018, I caused this document to be filed electronically through the CM/ECF system, which caused the Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 7th day of December 2018 at Seattle, Washington.

/s/ Thomas Linde

OBJECTION TO MOTION TO REOPEN
CASE, APPLICATION FOR APROVAL OF
TRUSTEE FEES, APPLICATION FOR
COMPENSATION OF ACCOUNTANT,
AND APPLICATION FOR
COMPENSATION OF ATTORNEY - 8

SCHWEET LINDE & COULSON, PLLC
575 S. MICHIGAN ST.
SEATTLE WA 98108
P: 206-275-1010 || F: 206-381-0101